SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

1 THE CIRCLE, SUITE 2
SUSSEX COUNTY COURTHOUSE
GEORGETOWN, DE 19947

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Re: ***Purcell v. East of the Sun, et al.***
C.A. No. SS07C-10-024-RFS

Upon Defendants' Motion to Enforce Settlement. Granted.

Submitted: March 18, 2010
Decided: March 26, 2010

Dear Counsel:

In this case, the Plaintiff, Joseph Purcell ("Purcell") has sued East of the Sun Association of Unit Owners, Inc. ("East of the Sun"), Legum & Norman, Inc. ("Legum & Norman"), and Shipley Management Services, LLC ("Shipley") for damages resulting from sewer failures. The complaint has been amended three times. Pending before the Court is a motion to enforce a settlement agreement to compromise claims arising on or before December 5, 2008, involving East of the Sun and Legum & Norman. After an evidentiary hearing on February 9, 2010, the following findings of fact and conclusions of law are made:

Findings of Fact and Background

1) Purcell is represented by Paul G. Enterline, Esquire, a member of the Delaware Bar ("Enterline").

2) East of the Sun and Legum & Norman are represented by David L. Baumberger, Esquire, a member of the Delaware Bar for claims involved in the motion ("Baumberger").

3) On December 5, 2008, Enterline accepted an offer from Baumberger to settle the claims giving rise to the suit against East of the Sun and Norman & Legum in the amount of $40,000. At that time, the claims and parties subject to the settlement were detailed in an amended complaint filed on December 18, 2007.

4) Enterline had discussed the offer with Purcell, and Purcell authorized him to accept it.

5) The compromise covered claims arising from sewer backups to Purcell's unit at East of the Sun occurring on or about March 21, 2004, January 15, 2006, February 3, 2006, and September 30, 2006. The defendants were East of the Sun and Norman & Legum. Before a release was signed to conclude settlement, another sewer failure occurred on January 17, 2009. Consequently, Purcell changed his mind and refused to follow through with the $40,000 settlement.

6) Initially, Purcell had retained another Delaware lawyer who filed suit. A $20,000 settlement for claims against the defendants for the flooding of his unit on March 21, 2004 was attempted. However, this settlement was not completed because of continuing sewer problems. The suit was filed on March 2, 2005 in the Court of Common Pleas and was subsequently transferred to the Superior Court on October 17, 2007 because the damage claims were beyond the first court's jurisdiction.

7) After the 2004 backup, Purcell spoke to Matthew Shipley. He is an employee of Shipley Management Services, LLC ("Shipley Management"), a property manager for East of the Sun. Norman & Legum appears not to have played any role in the incidents after March 21, 2004.

8) In 2006, Matthew Shipley advised that Roto Rooter would be employed by East of the Sun to clean out the sewer pipe underneath Purcell's unit located in Building 3 on a quarterly basis, as well as a parking lot once per year. The pipes in the other buildings were cleaned out less frequently. Roto Rooter did the quarterly work, and there were no problems until January 17, 2009.

9) In 2006, Matthew Shipley did not promise, guarantee, or insure on behalf of anyone that Purcell would not have further backup problems between September 30, 2006 and December 5, 2008. Rather, he stated that Roto Rooter would perform quarterly maintenance service. The quarterly service was provided.

10) For two years before the $40,000 settlement was made, there was no contact between Matthew Shipley and Purcell.

11) When the settlement agreement was made in December 2008, Matthew Shipley's statements and the Roto Rooter contract were not part of the negotiation process. The negotiations were conducted between the lawyers.

12) There was no mutual mistake of fact between the parties concerning the terms of the $40,000 settlement.

13) After Purcell changed his mind, a third amended complaint was approved for filing

on August 21, 2009. It added a claim for damages against East of the Sun and Norman & Legum for the January 17, 2009 incident and added Shipley Management as a party.

14) Thereafter, Bamberger filed a motion to enforce the $40,000 settlement. Enterline opposed this motion and moved to withdraw. Bruce Herron, Esquire entered his appearance for East of the Sun and Shipley Management for the January 17, 2009 incident. The Court held an evidentiary hearing with post-hearing submissions by the parties.

Conclusions of Law

a) A settlement agreement made by an attorney with authority is binding upon a client and cannot be repudiated. *Levykin v. Henry*, 1998 WL 283403 (Del. Super. 1998); *Shields v. Keystone Cogeneration Sys., Inc.* 620 A.2d 1331 (Del. Super. 1992);

b) A compromise and settlement agreement will be enforced absent fraud or other good reason. *Bandera v. City of Quincy*, 344 F.3d 47, 51-52 (1st Cir. 2003);

c) Purcell may have had subjective beliefs that Roto Rooter's service would completely end his problems. However, an offer and acceptance were made objectively without reference to or reliance upon the 2006 service agreement or any of Matthew Shipley's statements. Further, Roto Rooter's quarterly maintenance work was for routine cleaning and not for an extraordinary repair or replacement of the pipe. In any event, it was not an insurance policy against the risk of future failures and could not reasonably be seen as a guarantee against future problems;

d) After the January 17, 2009 event, Purcell changed direction about the $40,000 settlement and filed a third amended complaint. A standard release which excepted claims arising from the January 17, 2009 failure was tendered with the $40,000 but Purcell refused to settle. However, Purcell has failed to show that the compromise was fraudulently induced,

coerced, or the result of a mutual mistake;

e) Purcell relies upon the Family Court case of *M.A. v. J.R.*, 2003 WL 22476241 (Del. Fam. Ct.) to support his position. There, a spouse engaged in bad faith negotiations and immediately took unfair advantage by seeking a PFA order after making a custody agreement. The compromise would not have been made if a fair disclosure of the parties' intentions had been made. That case stands in contrast to the arms' length position of the parties in this case. Here, settlement was reached without any reservations in December of 2008 after 3 1/2 years of discovery and litigation.

Considering the foregoing, the motion to compel is granted. The claims against East of the Sun and Legum & Norman for actions arising on or before December 5, 2008 and asserted in the amended complaint filed on December 18, 2007 in the Superior Court are dismissed with prejudice on payment of $40,000 and signing of the release (attached as Exhibit B to Purcell's response against the motion to enforce settlement filed on January 13, 2010). Purcell's claims arising from the sewer failure of January 17, 2009 against any party are not affected by this decision. Mr. Enterline's earlier motion to withdraw as counsel is approved, and he shall provide Purcell with appropriate notice.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

RFS/cv

cc: Prothonotary